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No. 97-998

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

UNITED STATES *ex rel.* STANLEY RABUSHKA
AND STANLEY RABUSHKA,
Petitioners,

VS.

CRANE CO.,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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SUPPLEMENTAL STATEMENT OF THE CASE

In its Counterstatement of the Case, Crane acknowledges the "abrupt reversal of fortune" that CF&I suffered in 1982. But according to Crane, CF&I was, miraculously enough, back to sound financial health by the time of the 1985 spinoff. This spin on events is nothing more than an encore performance of the very fraud that Crane perpetrated in 1985 on stockholders, pensioners, employees and the PBGC–purporting to spin off a viable company that Crane knew had no chance of surviving as an independent company. A brief rejoinder is in order.

According to both Crane's CEO and its President, by February 1984 CF&I was a "bankrupt company." Crane's CEO saw "a number of problems" with spinning off CF&I in 1984, among which were "that there was no long-term financing in place" and that "giving the stockholders a taxable dividend in a bankrupt company wasn't doing them a favor." Crane's President testified that if CF&I was spun off without adequate, long-term financing, "CF&I would go into bankruptcy," precisely what Crane's President regarded as being contrary to everything "[m]oral, ethical, sound business practice, common sense, and the American way."[1] In IRS filings, Crane stated that CF&I needed "debt financing in order to survive." However, in 1985 Crane misleadingly told stockholders that the spinoff would "enhance CF&I's ability to obtain needed financing." CF&I never obtained that financing.

Crane claims CF&I had a "positive cash flow" of $29 million in 1984 and $12.5 million in 1985, as well as increased working capital. That cash flow and working capital were only possible because Crane had required CF&I to slash its pension fund

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[1] The foregoing, which Crane criticizes as "argument by sound bite" and "a shameless distortion of the record," Opposition at 4 n.2, is the sworn testimony of Crane's CEO, Robert Evans and President, Robert Slater, given before the SEC in 1985.

contributions in 1982. Thus, unlike CF&I's pension contributions of $38 million in 1980 and $22 million in 1981, CF&I made *no* pension contributions at all in 1983, 1984, 1985 and 1986. If Crane had permitted CF&I to continue making its pension contributions as it had consistently done for years prior to 1982, CF&I would not have had those positive cash flows or working capital and may well have been in bankruptcy before Crane spun it off in May 1985. In addition, the four straight years of zero pension contributions permitted the unfunded liabilities to skyrocket far in excess of the pension fund's rapidly diminishing assets.

Moreover, CF&I continued to report annual *losses*: $28.1 million in 1984, $3.4 million in 1985 and $20.9 million in 1986. CF&I's net sales dropped sharply–$22.5 million in the first half of 1985, $72 million by year end, and yet another $60 million in 1986. CF&I was also faced with the "pressing problem of trying to keep afloat during the next several months because cash is projected to be at zero sometime in October of 1986." According to CF&I's chairman, CF&I "basically lived to fund the pension plan" from the time of the 1985 spinoff to the 1990 bankruptcy.

The rosy scenario that Crane attempts to portray of CF&I is the same mirage that Crane created for public consumption at the time of the 1985 spinoff. It was never CF&I's reality.

ARGUMENT

Crane does not dispute that *Affiliated Ute Citizens of Utah v. United States,* 406 U.S. 128 (1972), applies to this case. The Eighth Circuit, however, failed to apply *Affiliated Ute*, denying Petitioner the benefit of the presumption of reliance which this Court established in that case. Having committed that fundamental error, the Eighth Circuit never considered whether Crane's evidence of nonreliance was sufficient to overcome the presumption of reliance as a matter of law. These and other errors warrant a grant of *certiorari*.

I. The Eighth Circuit's holding that reliance is an element of a fraudulent omissions case irreconcilably conflicts with *Affiliated Ute*'s holding that reliance is *not* an element of such a case.

Crane does not even attempt to reconcile the Eighth Circuit's holding that reliance is an element of (indeed, is "the very heart of," App. at A-8) a fraudulent omissions case, with this Court's holding that reliance is *not* an element of such a case. *Affiliated Ute*, 406 U.S. at 153-54. Apparently due to this stark conflict, Crane has chosen not discuss the Eighth Circuit's *holding*. Rather, Crane devotes its entire brief to defending the Eighth Circuit's *result* exclusively on grounds never even reached by the Eighth Circuit.

The only possible difference between this case and *Affiliated Ute* is that this is a False Claims Act case and *Affiliated Ute* was a securities fraud case. The reason Crane does not draw this distinction is most probably because that distinction actually weighs *in favor* of a grant of *certiorari*. If private investors are entitled to a presumption of reliance in fraudulent omissions cases against those who defraud the marketplace, it follows *a fortiori* that the public should be entitled to that same presumption in fraudulent omissions cases against those who would defraud the public purse. The *Affiliated Ute* presumption of reliance is not grounded upon the securities statutes, regulations or even any policy concerns unique to the realm of securities. The presumption is based upon the recognition that in cases of nondisclosure "it is of course impossible to demonstrate reliance." *Titan Group, Inc. v. Faggen*, 513 F.2d 234, 239 (2d Cir. 1975). The Second Circuit's observation is perhaps even more true in FCA cases, where the party whose "reliance" is at issue is the Federal Government and not a single individual.

The binding law throughout the Eighth Circuit now unjustly burdens the Government with the "impossible" task of proving

reliance on a nondisclosure. The plain and irreconcilable conflict between the Eighth Circuit's holding and *Affiliated Ute* alone warrants a grant of *certiorari*. The case is all the more worthy of *certiorari*, however, given what is at stake: the public's recovery of nearly $1 billion[2] for Crane's fraudulent concealment of highly material information from the Government, causing the Government to assume more than $222 million worth of Crane's pension liability. The Eighth Circuit's decision is abysmally bad law, standing in stark and intolerable conflict with *Affiliated Ute*. This Court's review is clearly warranted.

II. By imposing upon plaintiff, rather than defendant, the burden of proof on the issue of reliance, the Eighth Circuit placed itself in direct conflict with the very circuit decisions which Crane argues reconcile the Eighth Circuit's decision with *Affiliated Ute*.

Crane attempts to show only that the Eighth Circuit's *result* does not conflict with *Affiliated Ute*. In implicit concession that *Affiliated Ute* applies to False Claims Act cases based upon fraudulent omissions, Crane argues that the Eighth Circuit analyzed and decided this case in accordance with *Affiliated Ute* and its lower court progeny. In point of fact, the Eighth Circuit nowhere discusses *Affiliated Ute* or its progeny. Instead, in derogation of those decisions, the court never gave Petitioner the benefit of the *Affiliated Ute* presumption of reliance, and it never considered whether Crane's evidence was sufficient to overcome that presumption as a matter of law. According to the very cases upon which Crane relies, the failure to accord a plaintiff the benefit of the *Affiliated Ute* presumption constitutes reversible error. As Crane points out, "[e]very Circuit Court which has

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[2] In addition to awarding prejudgment interest, the False Claims Act mandates the trebling of the Government's compensatory damages, damages which exceed $222 million in this case. 29 U.S.C. § 3729(a).

considered the issue has ruled that the presumption of reliance set forth in *Affiliated Ute* may be rebutted." Opposition at 9. But, as Crane fails to point out, all eight of those circuits agree that "proof of the materiality of an omission . . . *shifts the burden of persuasion* on the issue of reliance. It is thus the defendant who must prove" nonreliance. *Du Pont v. Brady*, 828 F.2d 75, 78 (2d Cir. 1987) (emphasis added) (quoting *Rochez Bros. v. Rhoades*, 491 F.2d 402, 410 (3d Cir. 1974)).

In *Du Pont*, upon which Crane relies, the Second Circuit held that under *Affiliated Ute*, requiring a plaintiff to prove reliance in a fraudulent omissions case is reversible error. 828 F.2d at 78-79. The Eighth Circuit committed that very error in the present case, imposing on Petitioner, instead of on Crane, the burden of persuasion on the issue of reliance. The Eighth Circuit wrote that reliance "goes to the very heart of Rabushka's claims," that "[i]f Rabushka cannot show" reliance his case fails, and that Rabushka "does not have sufficient evidence to avoid summary judgment." App. at A-8, A-11. This flawed analysis of the evidence stems directly and unmistakably from the Eighth Circuit's initial error of refusing to give Petitioner the benefit of the *Affiliated Ute* presumption of reliance.

Attempting to salvage the result, Crane seems to suggest that the Eighth Circuit found that Crane had so decisively established the PBGC's nonreliance that no finder of fact, even aided by the *Affiliated Ute* presumption, could rationally conclude otherwise. Crane argues that the Eighth Circuit's gratuitous remark that Crane's evidence "overwhelmingly establishes that the PBGC would not have terminated CF&I's plan in 1985," aligns the court's otherwise erroneous opinion with case law recognizing that the *Affiliated Ute* presumption is rebuttable.

The fatal flaw in Crane's argument is that the Eighth Circuit did not give Petitioner the benefit of the *Affiliated Ute* presumption, and thus could not and did not evaluate whether Crane's

evidence was sufficient to overcome that presumption. Moreover, according to the Eighth Circuit, it was not the weight of Crane's evidence which supported the summary judgment but rather Petitioner's *lack* of evidence of reliance: "although Rabushka may have a scintilla of evidence in support of his theory, he does not have sufficient evidence to avoid summary judgment." App. at A-11.

It was only *after* the Eighth Circuit had already determined that Petitioner could not make his case that the court gratuitously commented upon Crane's evidence. The Eighth Circuit obviously viewed Crane's evidence as a mere final nail in Rabushka's coffin, a coffin resulting from Rabushka's failure to carry the burden on the issue of reliance. The Eighth Circuit certainly never considered whether Crane's evidence was so one-sided so as to overcome the *Affiliated Ute* presumption as a matter of law. This critical error squarely places the Eighth Circuit's decision in direct conflict with each and every one of the other circuit courts which have addressed the relative burdens of proof under *Affiliated Ute*. That conflict warrants a grant of *certiorari*.

III. But for Crane's fraudulent concealment of CF&I's true financial condition, the PBGC should and would have done precisely what it did after it learned of CF&I's financial plight.

In addition to its other errors, the Eighth Circuit committed a basic error of well-established summary judgment law. Rather than viewing Petitioner's evidence in the light most favorable to him, the court dismissively labeled his evidence as a "scintilla." App. at A-11. That evidence, whatever its weight, should have been viewed as buttressing the *Affiliated Ute* presumption of reliance, something the Eighth Circuit could not possibly have done, given its failure to recognize that presumption.

The Eighth Circuit discounted entirely Royal Dellinger's (the former PBGC employee on whose testimony Crane rests its

entire argument) concession that if the PBGC had known that the spinoff would completely liquidate CF&I, the PBGC

> clearly would have reviewed the case differently.... I think the agency would have initiated an effort to find out if in fact a liquidation was going to occur. App. at A-11.

The Eighth Circuit also ignored the undisputed fact that when the PBGC finally did terminate CF&I's pension plan, it did so despite the very conditions which Dellinger said *must* exist for termination according to some unwritten PBGC "policy"–a "policy" which according to Dellinger remains in place to this day. That alleged, unwritten "policy" was that the PBGC would not terminate a plan "unless it became apparent that the Plan would be unable to make pension payments within the year." Opposition at 8. However, after CF&I's true financial plight could no longer be concealed from outsiders, the PBGC terminated CF&I's Plan even though, by the PBGC's own estimation, CF&I was at least *two years* away from being unable to pay benefits. The PBGC's termination of the Plan under these circumstances directly contradicts Dellinger's uncorroborated testimony about the supposed PBGC "policy" which is the sole basis for the Eighth Circuit's opinion.

Moreover, internal PBGC documents show that when the PBGC terminated the Plan, it relied primarily on CF&I's pre-1985, pre-spinoff financial crises, concluding that "CF&I Steel is a very sick company with a heavily underfunded pension plan." The PBGC cited CF&I's "*1982* restructuring"–three years before the spinoff–as having left "a retiree burden beyond CF&I's ability to handle." Thus, not only did the PBGC do what Dellinger says it would never have done (*i.e.*, terminate the Plan in the absence of the condition precedent he cited), the PBGC took that action for reasons Dellinger says would never have prompted PBGC action. By crediting Dellinger's testimony, the Eighth Circuit made precisely the kind of credibility assessment

which is entirely inappropriate when considering a motion for summary judgment.

IV. By refusing to consider the unlawfulness of the action Dellinger claims he would have taken, the Eighth Circuit implicitly and necessarily repudiated this Court's recognition of "[t]he general principle of public policy applicable to all governments that the public interest should not be prejudiced by the negligence or default of public officers."

In an effort to circumvent yet another conflict between the Eighth Circuit and this Court, Crane tries to recast the issue here as a "policy dispute" between Petitioner and the PBGC. In doing so, Crane elevates the alleged, unwritten Dellinger "policy" as the yardstick by which this government employee's conduct is to be measured. As the *amicus curiae* points out, "the laws and regulations applicable to the practices of the federal agency in question" must set the standard. *Amicus* Brief at 6. A Nuremberg-like defense ("I was only following agency policy") threatens to eviscerate the canon "that the public interest should not be prejudiced by the negligence or default of public officers." *United States v. St. Paul, M. & M. Ry. Co.*, 247 U.S. 310, 314 (1918).

This is not some arcane and antiquated policy. This Court recently reasserted its unflagging commitment to this principle:

> Of this it is enough to say that the United States is neither bound nor estopped by acts of its officers or agents in entering into an arrangement or agreement to do or cause to be done what the law does not sanction or permit.

Office of Personnel Management v. Richmond, 496 U.S. 414, 420 (1990). As the Court in *Richmond* mentioned, this principle has been reiterated in "many other cases."

Dellinger speculatively claims that he would not have acted to prevent the PBGC's $222 million loss even if he had known that the PBGC "could have completely avoided such liabilities by asserting a claim against Crane." If that is true, then his conduct would have been reckless in the extreme and counter to the very mission of the PBGC. Although Dellinger has simply speculated about what he would *not* have done in 1985, this Court's precedents make abundantly clear that such unauthorized conduct would not have been binding on the Government anyway. By giving dispositive weight to Dellinger's claim, the Eighth Circuit has implicitly and necessarily repudiated those precedents. This conflict also warrants a grant of *certiorari*.

V. In Sections II and III of its brief, Crane resumes its attempted defense of the Eighth Circuit's result on grounds never discussed by that court.

As surmised in the treatise Crane cites, even a split among circuits regarding whether state or federal law applies to a case may not warrant a grant of *certiorari* when the application of either law yields the same outcome. Although that is a plausible rationalization for the unexplained denial of *certiorari* in *Sommerville v. United States,* 376 U.S. 909 (1964), it quite obviously has no relevance to the present case involving an outcome-determinative conflict with this Court's precedent.

Moreover, Crane's statement that "[t]he courts below granted Crane's motion for summary judgment on two independent grounds" is blatantly false. The Eighth Circuit affirmed "for a reason different from those relied upon by the district court"–a reason which is the very subject of the present Petition. In Section II, Crane discusses only the *district court's* reasoning for entering summary judgment. The validity of that reasoning now stands in considerable doubt, inasmuch as the Eighth Circuit declined to endorse it when given the opportunity to do so. In Section III, Crane advances a potpourri of theories which the

district court flatly rejected and still other theories which Crane raised for the first time on appeal; the Eighth Circuit never addressed any of these issues. Thus, if this Court grants *certiorari*, the "ultimate outcome" is not at all "evident." Crane offers no sound basis for a denial of *certiorari* in this case where the Eighth Circuit's decision stands in irreconcilable conflict with well-established law of this Court.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the Court grant a writ of *certiorari* in this case.

Respectfully submitted,

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